

No. 3769

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN SWENDIG, JAMES W. MILLER,
REMIGUS GRAB, ANTHONY KERR,
Appellants,

VS.

THE WASHINGTON WATER POWER
COMPANY, a Corporation,
Appellee.

Transcript of the Record

*Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.*

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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*In the District Court of the United States, for the
District of Idaho, Northern Division.*

THE WASHINGTON WATER POWER
COMPANY, a Corporation,

Plaintiff.

vs.

JOHN SWENDIG, JAMES W. MILLER,
REMIGUS GRAB, ANTHONY KERR,

Defendants,

CONSOLIDATED CAUSES.
No. 752, 753, 754 and 755.

COMPLAINT

Against John Swendig.

The Washington Water Power Company, a corporation organized under the laws of the State of Washington, as plaintiff brings this bill of complaint against John Swendig, and for cause of action alleges:

I.

The plaintiff is now and was at all of the times mentioned in the complaint, a corporation created and existing under and by virtue of the laws of the State of Washington, having its principal place of

business at Spokane, Washington, and now is, and was at all of the times mentioned in this complaint, a citizen of the State of Washington, and has at all of the times hereinafter mentioned fully complied with the laws of the State of Idaho relating to foreign corporations, and is now, and was at all of the times herein mentioned, authorized and empowered by virtue of such compliance with the laws of the State of Idaho to do business and to acquire and hold property in said state, and that under and by virtue of its articles of incorporation it is and at all of the times herein mentioned has been empowered to construct, acquire, own and operate electric power transmission lines and telephone lines in the State of Idaho.

That the defendant is a resident and citizen of the State of Idaho.

II.

That the jurisdiction of the United States District Court for the District of Idaho over this suit is invoked and depends upon the following grounds, to-wit:

(1) Upon the ground that the construction and application of the Act of February 15th, 1901, Chapter 372, (31 Statutes at Large, 790) entitled "An Act Relating to rights of way through certain parks, reservations, and other public lands"; and also the Act of March 3, 1901, (31 Statutes at Large, 1083) is involved; and also the Act of June 21, 1906 (34 Statutes at Large, 335) is involved;

and that the amount in controversy exceeds in value the sum of \$3000, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth. That the suit involves a claim to real property in the District of Idaho.

(2) On the ground that the plaintiff is a citizen and resident of the State of Washington and that the defendant is a citizen and resident of the State of Idaho, as appears by the first paragraph of this bill of complaint, and that the suit involves a claim of title to real property in the Northern Division of the District of Idaho, and the amount in controversy in this suit exceeds in value, exclusive of interest and costs, the sum of \$3000.

III.

That the land described as Section 26, Township 47, N. R. 3, W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

That prior to April 15, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which said right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3 W. B. M., the said application being made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled "An Act making appropriation for

the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes.”

That at that time the said lands were a part of the Coeur d’Alene Indian Reservation and were unsurveyed and not open to settlement.

The right, authority and permission to survey and locate and maintain a telephone line through and across the said Coeur d’Alene Indian Reservation and across the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., was on the 15th day of April, 1902, granted by the Honorable Secretary of the Interior upon condition that the company pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, which said compensation was thereafter assessed and fixed by the said Secretary of the Interior at the sum of \$224, which said sum was by this plaintiff paid into the office of Indian Affairs under the said act of congress above referred to.

That the said right of way and easement granted by the said Secretary of the Interior, as aforesaid, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

That the said grant and easement above mentioned has ever since been and now is a valid and subsisting grant and easement and in full force and effect.

IV.

That prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790). That the right, authority and permission applied for was given by the Honorable Secretary of the Interior under date of July 7, 1902, and the use of the right of way was permitted in accordance with the provisions of said act of congress and the regulations thereunder.

That at that time the said lands over which the said right of way was sought were a part of the Coeur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

That the said permit so given to this plaintiff by the Secretary of the Interior on the said 7th day of July, 1902, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

That the said permit above mentioned has ever since been and now is a valid and subsisting permit in full force and effect, and was issued long prior to any rights initiated by the defendant and long prior to the time when said lands were open to occupancy and settlement.

V.

That pursuant to the said permit, the plaintiff did construct over and across the said Coeur d'Alene Indian Reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, and ever since on or about the 24th day of August, 1903, has been using the same for the purpose of supplying electric power and energy in the mining district of Shoshone County, Idaho, and that the said electric power transmission line is of great value, to-wit, of more than the value of \$25,000, and that the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than \$25,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$25,000, exclusive of interest and costs.

VI.

That the said plaintiff, under its easement and right to construct a telephone line, did also construct over and across said right of way and upon the same poles as the electric power transmission line was constructed, a telephone line and

has continued to operate and maintain the same and use the same ever since on or about the 24th day of August, 1903. That the said telephone line is of great value, to-wit, of the value of more than the sum of \$5000, and the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than \$5000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$5000, exclusive of interest and costs.

VII.

That is it necessary for the plaintiff to patrol the said line and every part thereof, including that portion of the line which extends across the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., and in order to do so the plaintiff, did, under its permit and as a necessary part of the construction and maintenance of said line, construct along the said power transmission line a patrol road, which said patrol road this plaintiff constructed during the years 1902 and 1903, and ever since has used the same, except as the use thereof has been interferred with by the acts of the defendant, as hereinafter set forth.

That the said patrol road is necessary in order for the patrolmen to pass along the said power transmission line for the purpose of watching the same, keeping the same in working condition and in the event of accident or injury thereto for the

purpose of repairing or renewing the same, and is covered by the said easement and also by the said permit.

VIII.

That the said power transmission line, telephone line and patrol road have not been changed whereby they would differently affect the said North-east quarter of Section 26, Township 47 N. R. 3, W. B. M., since the year 1903.

IX.

That by virtue of said facts, this plaintiff became vested by virtue of its said permit with the right to maintain and operate its said electric power transmission line as provided in the said permit, and that by virtue of such facts, the defendant, took whatever right, title or interest was vested in him by the Government of the United States by virtue of said permit to said land subject to the permit granted by the government of the United States to this plaintiff and the permit to use the said lands in connection with its said power transmission line and the rights of the defendant are subsequent to and subject to the rights of this plaintiff under and by virtue of said permit above described, which has never been revoked and remains in full force and effect.

That also by virtue of said facts, this plaintiff became vested by virtue of its said easement to use said land in connection with its telephone line, as provided in said easement, and that by virtue

of such fact the defendant took whatever right, title or interest was vested in him by the Government of the United States by virtue of said patent to said land, subsequent and subject to the easement granted by the Government of the United States to this plaintiff and the easement to use said land in connection with its said telephone line, and the rights of the defendant are subsequent to and subject to the right of this plaintiff under and by virtue of said easement above described, which has never been revoked and which remains in full force and effect.

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26,

Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about the 3rd day of May, 1913, and thereafter patent of the United States was issued therefor on or about the 30th day of October, 1913, and the defendant holds under said title.

XI.

That at the time said lands were settled upon by the defendants as also at the time the said lands were selected and filed upon by the said defendant, and at all times since, the said permit and said easement of this plaintiff, and each thereof were in full force and effect, and said power line, telephone line and patrol road had been constructed over and across said lands, and at all of said times were used by the said plaintiff and any rights acquired by the said defendant were subsequent to and inferior to the plaintiff's easement, and subject to and inferior to plaintiff's said permit.

That at and before the defendant settled upon or filed upon said lands or initiated any rights thereto, the said power transmission line, telephone line and patrol road were constructed over and across said lands and the plaintiff was maintaining and operating its said lines and the said defendant at the time of acquiring any right had full notice and knowledge of said plaintiff's said easement and that the plaintiff was operating the said telephone line thereunder, and also had full notice and knowledge of the plaintiff's said per-

mit and that the plaintiff was maintaining and operating its said electric power transmission line, and for the purpose of caring for the same and patrolling the same, renewing and repairing the same, had constructed and was using the said patrol road, and that the said telephone line, electric power transmission line and patrol road crossed, among other lands, the said lands described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

That the said defendant acquired any rights by virtue of his settlement and filing upon said lands with full knowledge of all such facts and the patent issued by the Government of the United States therefor was subject to the rights of this plaintiff both under said permit and said easement.

XII.

That the said permit so granted unto this plaintiff for the maintenance of said electric power transmission line as also the easement and rights to this plaintiff for a right of way for said telephone line granted under the said two acts of congress, heretofore referred to, were prior to any right acquired by the defendant, and the settlement and initiation of the rights of the defendant on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, and the subsequent patent of said lands to the said defendant by the United States Government under and by virtue of the Act of June 21, 1906, did not affect, revoke or annul

either the said permit or the said easement, and the plaintiff has at all times since the granting thereof had the right to operate and maintain the same, and has had the right to patrol the same and to maintain for that purpose the said patrol road along the same. That the said patrol road is a necessary incident to the maintenance of said power transmission line.

XIII.

That the said defendant, since acquiring his interest in said lands, has extended a fence across said rights of way on the east of the section line of said Section 26, and another fence approximately along the north and south quarter line of said Section 26, Township 47 N., R. 3 W. B. M., and has so constructed the said fences and wired the same up as to prevent this plaintiff and its employes from driving along the same or passing along the same with any vehicle or horse, and has closed up said patrol road and declines and refuses to permit this plaintiff to patrol the same and has notified the employes of this plaintiff that they should not go upon the said land to repair the said lines or the poles or to otherwise maintain the same, and gives out and threatens that he will prevent the plaintiff or its employes from going along the same or repairing the said transmission line and telephone, all of which is in violation of the rights of this plaintiff granted as aforesaid; and has ordered this plaintiff and its

employees in the future not to go upon said lands for the purpose of repairing said lines.

XIV.

That the said homestead entry and settlement of the defendant and the said patent of the United States issued pursuant thereto were all subject to the rights of this plaintiff and the issuance of said patent by the Government of the United States did not modify, annul, revoke or cancel either the said permit or the said easement.

That the said defendant has prevented the employees of this plaintiff from driving along said right of way and patrolling the same in a proper manner, and threatens to continue said conduct in the future, and has warned the employees of this plaintiff not to go upon said land to repair the said power transmission line and telephone line or either thereof, or the poles upon which the same are strung, and threatens to continue such conduct in the future, all of which will seriously impede and interfere with the performance of its duties as a public service corporation by the plaintiff and prevent it from enjoying its rights under the said permit and under said easement.

That this plaintiff is engaged in furnishing power for the use of the mines of the Coeur d'Alene mining district and for the use of the inhabitants of that district for light and power, and furnishing light for municipal use, and the acts of the de-

fendant do interfere with and will interfere with the discharge of those duties.

WHEREFORE, plaintiff prays:

(1.) That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3. W. B. M., and from passing along and over the said patrol road;

(2.) That the said defendant, his agents, servants and employees, be restrained during the pendency of this action from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3. W. B. M., and from passing along and over said patrol road;

(3.) That this court shall decree that the said permit and the said easement and each thereof are in full force and effect and that the said patent of the United States did not annul, revoke or modify or affect the rights of this plaintiff thereunder.

(Title of Court and Cause.)

COMPLAINT AGAINST JAMES W. MILLER
X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335) provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 4th day of May, 1910, the defendant made a homestead filing upon the land described as the North half of the Southwest quarter and the East half of the Northwest quarter of Section 26, Township 47 N., R. 3. W. B. M., and thereafter made final proof on or about the 3rd of June, 1913, and thereafter patent of the United States was issued therefor on or about the 23rd day of January, 1913, and defendant holds under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

COMPLAINT AGAINST REMIGUS GRAB

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 7th day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 24, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about June 24, 1912, and thereafter patent of the United States was issued therefor on or about the 24th day of September, 1912, and the defendants holds under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause)

COMPLAINT AGAINST TONY KERR

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 22nd day of December, 1910, the defendant made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19, Township 47 N., R. 2 W. B. M., and thereafter made final proof September 28, 1917, and thereafter patent of the United States was issued therefor on or about the 15th day of October, 1918, and

the defendants hold under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause)

ANSWER OF JOHN SWENDIG

Comes now the defendant and for answer to plaintiff's alleged cause of action, admits, denies and alleges as follows:

I.

Admits all of paragraph I of plaintiff's complaint.

II.

Answering paragraph III of plaintiff's complaint, defendant admits that the land described as Section 26, Township 47, N. R. 3 W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

As to whether or not, "Prior to April 15, 1902, plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3. W. B. M., the said application being made in pursuance of Section 3 of

the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,' defendant has no information or knowledge sufficient to enable him to answer, therefore he denies each and every allegation thereof, and each and every allegation in said paragraph contained, and denies that prior to April 15, 1902, or prior to any other date, or on any other date, plaintiff filed an application with the Department of the Interior of the United States, or with any other department of the United States, for authority to construct a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation in the State of Idaho, and denies that said right of way so applied for, if applied for, crossed among other land within said reservation, the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and denies that said application, or any other application, "was made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,' "or that said application or any other application for said

permit, or any application for any permit to construct a telephone line across the Coeur d'Alene Indian Reservation, which permit was also over and across said land, was ever filed, by or in behalf of plaintiff, with the Department of the Interior of the United States, or with any other department of the United States, pursuant to said above-mentioned act, or pursuant to any other act or acts of Congress whatsoever.

Denies that the right, authority and permission, or the right, authority, or permission, or any other right, authority or permission, to survey, locate and maintain, or to survey, locate or maintain a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, or across said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; was, on the 15th day of April, 1902, or on any other day, or date, granted to plaintiff or any person in its behalf by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority or permission, upon condition that plaintiff pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, or upon any other condition or conditions, or at all; denies that said compensation, or any other compensation, was thereafter assessed and fixed, or assessed or fixed, by said Secretary of Interior, or by any other person having

lawful authority to so assess or fix such compensation, at the sum of Two Hundred Twenty-four (\$224.00) Dollars, or was assessed and fixed, or assessed or fixed, by said Secretary of the Interior, or any other person having lawful authority to so assess or fix such compensation, at any other sum or sums whatever, or at all; and denies that plaintiff, or any person in its behalf, paid into the office of Indian Affairs, or into any other office of the United States, under said Act of Congress, above referred to, or under any other act or acts of Congress, or at all, the sum of Two Hundred Twenty-four (\$224.00) Dollars, or any other sum or sums whatever for any permit, right or authority, to survey, locate and maintain, or to survey, or locate, or maintain, a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, which permit, right or authority crossed the above-described land.

Denies that the said right of way and easement, or said right of way or easement, or any other right of way or easement, granted by the Secretary of Interior, or by any other person having lawful authority to grant such rights of way or easements, was over and across, or over or across, together with other lands the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and further denies that any right of way or easement, whatsoever, has ever been granted by the Secretary of Interior, or any other person having lawful au-

thority to grant the same, to plaintiff, or any person in its behalf, or to any other person, to go upon said land or any part thereof for the purpose of constructing, locating, or maintaining any telephone line or lines whatsoever.

Denies that said grant and easement, or said grant or easement above-mentioned, or any other grant and easement, or any other grant or easement has ever since been and now is, or has ever been, or not is, a valid and subsisting grant and easement in full force and effect, or a valid or subsisting grant and easement in full force and effect, or a valid and subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in force or effect.

III.

Answering paragraph IV of plaintiff's complaint, defendant says that as to whether or not, "Prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790)" defendant has no sufficient information or knowledge to enable him to answer, therefore and upon that ground, denies

each and every allegation thereof and each and every allegation in said paragraph contained, and denies that prior to July 7, 1902, or prior to any other date, or on any other date or day, plaintiff, or any person in its behalf, filed an application with the Department of the Interior of the United States, for a permit for a right of way across, and permission to construct and maintain, or for a permit for a right of way across or permission to construct or maintain, or for a permit for a right of way across or permission to construct or maintain an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the above-described land; and denies that said application, or any other application for said purposes, was made in pursuance of the provisions of the Act of February 15, 1901 (Statutes at Large, 790), or that any application, whatsoever, was made, by plaintiff, or any person in its behalf, in pursuance of any other Act of Congress, for a permit for a right of way, or permission to construct and maintain, or permission to construct or maintain, an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; and denies that the right, authority and permission, or right, authority or permission, applied for, if applied for, or any other right, au-

thority and permission, or any other right, authority or permission, was given by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority, and permission, or such right, authority or permission, under date of July 7, 1902, or under any other date, or at all, and further denies that the use of the right of way, or the use of any other right of way, whatsoever, was permitted in accordance with the provisions of said Act of Congress and the regulations thereunder, or in accordance with the said Act of Congress or the regulations thereunder, or was permitted in accordance with any other provisions of said Act of Congress, or any provisions of any other Act of Congress, or was permitted at all.

Admits that the above-described land, of this defendant, was a part of the Coeur d'Alene Indian Reservation, and in the year of 1902, was unsurveyed and was not open to settlement, but denies that any right of way was ever sought by plaintiff, or any person in its behalf, or by any other person, over and across, or over or across, said land for any purpose, or purposes whatsoever.

Denies that said permit, or any other permit, so given, or in any other manner given to this plaintiff, or any person in its behalf, or any other person whatsoever, by the Secretary of Interior, or any other person having lawful authority to give such permits, on the 7th day of July, 1902, or on any other date, was over and across, or over or across,

the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

And denies that the said permit above-mentioned, or any other permit, whatsoever, for said purposes, or for any other purposes, has ever since been and now is, or has ever been, or now is, in full force and effect, or in full force or effect; and further denies that said permit, or any other permit, whatsoever, was issued to plaintiff, or any other person, prior to the time when said lands were open to occupancy and settlement, or prior to the time when said lands were open to occupancy or settlement, or prior to any rights initiated by the defendant, or subsequent to said times, or at all.

IV.

Denies that pursuant to the said permit, or that pursuant to any other permit, the plaintiff did construct over and across, or over or across the Coeur d'Alene Indian Reservation a high tension electric power transmission line, and further denies that plaintiff ever had any permit, whatsoever, to construct over and across, or over or across, said reservation, or said land, a high tension electric power transmission line, or any other line.

Admits that plaintiff did construct, and is now maintaining a high tension electric power transmission line across the land that was formerly the Coeur d'Alene Indian Reservation, and particularly across the above-described land of this defendant but denies that it ever had, or now has, any permit

to so construct and maintain, or construct or maintain, said line across the land aforesaid; and admits that the right to maintain the same is of the value of more than Twenty-five Thousand (\$25,000.00) Dollars, but denies that plaintiff has ever had or now has any right to so maintain said line; and denies that plaintiff has any right under said permit, if such permit ever existed, or under any other permit relating to the land that was formerly part of said reservation and now belongs to this defendant; and further denies that the right to exercise the rights of plaintiff under said permit, is of the value of Twenty-five Thousand (\$25,000.00) Dollars, or any part thereof, or that the right of plaintiff, as relating to said land, is of the value of any other sum or sums, whatever.

V.

Denies that said plaintiff, under its said easement and right to construct a telephone line, or under its said easement or right to construct a telephone line, or under any other right and easement, or right or easement, to construct a telephone line across said lands, did also construct over and across, or over or across said right of way and upon the same poles, or over or across said right of way, or on the same poles, as the electric power transmission line was constructed, a telephone line. Admits that plaintiff did construct a telephone line over and across the said lands and upon the same poles, as the electric power transmission line, and

admits that plaintiff has been using the same for some time past, but denies that plaintiff ever had any authority, or permit, or right, whatsoever, to so construct said telephone line or any other line across the said lands. Admits that the right to maintain said telephone line is of great value, but denies that plaintiff has any right whatsoever to so maintain the same, or ever had any right to construct the same, upon said land.

VI.

Denies that it is necessary for the plaintiff to patrol the said lines and every part thereof, or said line or any part thereof; and denies that it is necessary for the plaintiff to patrol that portion of the said line which extends across the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; denies that, in order to patrol said line, the plaintiff did, under its permit and as a necessary part of the construction and maintaining of said line, or under its permit or as a necessary part of the construction and maintaining of said line, or under its permit or as a necessary part of the construction or maintaining of said line, or at all, construct along the said power transmission line a patrol road, which said patrol road was constructed during the years of 1902 and 1903, or during the year of 1902 or 1903, or during any other year or years, or at all; denies that plaintiff has used said patrol road, or any part thereof, or any other patrol road, since said time, or any part thereof;

or at all; and further denies that plaintiff ever had, or now has, any permit, or right whatsoever, to construct said power transmission line, telephone line, or patrol road, or that plaintiff ever had, or now has, any right whatsoever, to maintain the same upon said land of this defendant, and denies that said patrol road is a necessary part of the constructing and maintaining, or the constructing or maintaining said power line and telephone line or either of them.

Denies that said patrol road, or any part thereof, or any other patrol road, is covered by said easement and also by the said permit, or is covered by said easement or by the said permit, or by any other easement and permit, or by any other easement or permit, whatsoever; and further denies that plaintiff now has or has ever had any easement or permit of any kind or nature in any manner connected with the aforementioned land of this defendant.

VII.

Denies that by virtue of said facts, or by virtue of any facts, this plaintiff became vested by virtue of its said permit, or by virtue of any other permit, with the right to maintain and operate, or the right to maintain or operate its said electric power transmission line, or any other line, as provided in the said permit, if said permit ever existed, or any other permit, or at all; and denies that by virtue of such facts, or by virtue of any other

facts, the defendant took whatever right, title or interest that was vested in him by the government of the United States subject to the permit granted by the Government of the United States to plaintiff, or subject to any other permit granted by the United States to this plaintiff, or to any other person or persons, or subject to any permit, whatever, granted by any other person or persons having lawful authority to grant such permits; and denies that the title or interest of this defendant, in said land is subject to the permit, or any other permit, to use the said lands in connection with plaintiff's power transmission line; and further denies that the rights of defendant are subsequent to and subject to, or are subsequent to or subject to, the rights of this plaintiff under and by virtue, or under or by virtue, of said permit above described, or any other permit; and further denies that plaintiff now has, or ever had, any permit, right or rights, whatsoever, to use the above-described land in any manner; and denies that plaintiff's permit, if plaintiff ever had a permit, has never been revoked; and further denies that said permit is in full force and effect, or is in full force or effect, or is in force and effect, or has ever been in force or effect, upon the land of this defendant.

Denies that by virtue of said facts, or by virtue of any other facts, this plaintiff became vested by virtue of its said easement, or by virtue of any easement, to use said land in connection with its

telephone line, as provided in said easement, or any other easement, or at all; and denies that by virtue of such facts, or by virtue of any facts, the defendant took whatever right, title or interest that was vested in him by the Government of the United States by virtue of said patent, subsequent to and subject to, or subsequent or subject to, the easement granted by the Government of the United States, or subject to any other easement granted to this plaintiff by any person, whatsoever, having lawful authority to grant such easements; and further denies that the easement, or any other easement, to use said land in connection with its said telephone line has ever been granted to this plaintiff or any person in its behalf, or at all, by any person, persons, or state having the lawful authority to grant such easements across the land in question; and denies that the rights of the defendant are subsequent to and subject to, or are subsequent or subject to, the right of this plaintiff under and by virtue, or under or by virtue of said easement, or any other easement, or are subject to the rights of this plaintiff in any other manner, and further denies that plaintiff has any rights, whatsoever, in any wise connected with the said land of this defendant; and denies that said easement has never been revoked, and denies that it remains in full force and effect, or in full force or effect, or in force or effect; and further denies that any such

easement, has ever been, or now is, in force or effect.

VIII.

Denies that at the time of the issuance of said permit, if said permit was ever issued, to this plaintiff, or any person in its behalf, or at the time of the issuance of said easement, if said easement was ever issued, to this plaintiff, or at the time of the construction of said electric power transmission line, or at the time of the construction of said telephone line, or at the time of the construction of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

Admits that on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about May 3, 1913, and thereafter patent of the United States was issued to defendant therefor on or about the 30th day of October, 1913, and that defendant holds under said title.

IX.

Denies that at the time said lands were settled upon by the defendant as also at the time the said lands were selected and filed upon by him, and at all times since, or at any of said times, the said permit and easement, or said permit or easement of this plaintiff, or any of them were in full force

and effect, or were in full force or effect, or were in force or effect, and denies that at said times, or at any of said times, said power line, telephone line and patrol road, or any of them, had been constructed over and across, or over or across, said lands, and denies that at any of said times, said telephone line or said power line, or said patrol road were used by the said plaintiff, and further denies that any rights acquired by the said defendant were subsequent to and inferior to, or were subsequent to or inferior to plaintiff's easement, or were subject to and inferior to, or subject to or inferior to plaintiff's said permit, or that defendant's right were in any manner, whatever, subject to any rights of plaintiff, or are now subject to any such rights; and further denies that plaintiff ever had, or now has, any right or rights, whatever in, over or to the land now belonging to this defendant.

Denies that at and before, or at or before, the defendant settled upon or filed upon said lands or initiated any rights thereto the said power transmission line, telephone line or patrol road were constructed over and across, or over or across, said lands; and denies that the plaintiff was maintaining or operating, or was maintaining and operating its said lines at the times aforesaid, or any of them; and denies that the said defendant at the time of acquiring any right had full notice and knowledge, or notice or knowledge, of plaintiff's

said easement; and denies that the plaintiff was operating the said telephone line thereunder at the times aforesaid, or that plaintiff had any such easement at said times, or at any other times or time; and denies that defendant had full notice and knowledge, or notice or knowledge of the plaintiff's said permit, or any other permit, and further denies that plaintiff ever had, or now has, a permit to go upon said land for the purposes of said telephone line, electric power transmission line, or patrol road, or for purposes in anywise connected with the same or for any other purpose, or at all; and denies that for the purpose of caring for the said lines and for patrolling the same, renewing and repairing the same, or for any of said purposes, or for any other purposes, plaintiff had constructed and was using the said patrol road, or had constructed or was using the same; and denies that at the times aforesaid, or any of them, the said telephone line, electric power transmission line or patrol road crossed, the said lands described as the Northeast quarter of Section 26, Township 47 N R. 3 W. B. M.

Denies that the said defendant acquired any rights by virtue of his settlement and filing or by virtue of his settlement or filing upon said lands with full knowledge or any knowledge of all or any such facts; and further denies that they are facts; and denies that the patent issued by the Government of the United States, therefore was subject

to the rights of this plaintiff either under said permit, or any permit, or at all, or under said easement, or any easement, or at all; and further denies that plaintiff now has, or has ever had, any rights whatsoever, in any manner connected with the said land of defendant for any purpose or purposes, or at all.

X.

Denies that said permit so granted, or any permit granted to this plaintiff, or any person in its behalf, or to any other person whatsoever, for the maintenance of said electric power transmission line or the easement and rights, or easement or rights, of this plaintiff, for a right of way for said telephone line, or any other telephone line, granted under said two acts of Congress, or granted under any other act or acts of Congress, were acquired prior to any right acquired by defendant; and denies that the settlement and initiation, or the settlement or initiation, of the rights of the defendants on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, or either of them; and further denies that said patent was subsequent to plaintiff acquiring said rights by virtue of said permit or by virtue of said easement, or that said patent was subsequent to or subject to any right, easement, or permit given to this plaintiff, or otherwise acquired by it in any manner whatsoever; and further denies that plaintiff

ever had, or now has any such right, or any other right, or rights in anywise connected with said land; and denies that said patent did not effect, revoke and annul, or did not effect, or revoke, or annul, either the said permit or the said easement, if either ever existed; and denies that the plaintiff has at all times since the granting thereof, or at any of said times, had the right to operate and maintain or the right to operate or maintain the same, or ever had, or now has, any such right; and denies that plaintiff has had or now has the right to patrol the same or to maintain for that purpose the said patrol road along the same; and further denies that said patrol road is a necessary incident to the maintenance of said power transmission line, or is a necessary incident to any other right or rights of this plaintiff; and further denies that plaintiff ever has had or now has, any such rights or any rights whatsoever, in, over, or to said land.

XI.

Denies that the extension of any fence across the right of way now occupied by plaintiff's line, or the building or extending of any fence or fences in any manner whatever on the land of this defendant above-described, has deprived or will deprive plaintiff of any rights whatsoever, now held or at any time held or owned by said plaintiff, which rights are in any manner connected with said land; and further denies that plaintiff now has, or has ever had any right in, to, or over the lands afore-

mentioned; and denies that any act or acts of defendant in any manner connected with the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., has, or will deprive this plaintiff of any right or rights whatsoever.

XII.

Denies that the said homestead entry and settlement, or either of them, of the defendant and the said patent of the United States issued pursuant thereto, were all, or any of them subject to the rights of plaintiff; and denies that said patent did not modify, annul, revoke and cancel the said permit and said easement and each of them.

And denies that the acts, or conduct of this defendant, in any manner connected with said land, will, or has deprived or prevented plaintiff from enjoying its rights under the said permit and under the said easement, or either of them, and denies that plaintiff now has or has ever had any right, or rights whatsoever in any manner connected with the aforementioned land, for any purpose or purposes, or at all; and further denies that plaintiff now has, or has ever had any permit or easement to go upon or occupy said land for any purpose or purposes, **whatsoever.**

FOR A FURTHER, SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION, DEFENDANT ALLEGES:

I.

That at all times herein mentioned, defendant has been and now is a citizen of the United States of America, over the age of 21 years; and now is and during all the times hereinafter mentioned has been, a citizen of the United States and of the State of Idaho.

II.

That prior to the 2nd day of May, 1910, the land mentioned in plaintiff's complaint, and described as the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., Kootenai County, Idaho, was a part of the unappropriated Public Domain of the United States; and thereafter and on or about the 2nd day of May, 1910, defendant duly, regularly and in conformity with the law made a homestead filing upon said land; and thereafter, and on or about the 3rd day of May, 1913, duly and regularly made final proof upon said land; and thereafter and on or about the 30th day of October, 1913, a patent for the land described as, the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., was duly and regularly issued by the United States of America to this defendant.

III.

That said patent, so issued, from the United States to this defendant, conveyed all the right, title and interest of said grantor in and to said land to this defendant, free from all permits, licenses, easements and servitudes of whatsoever kind

or nature, except, "Any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there in reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder," and is in words and figures as follows:

Coeur d'Alene 03983

4-1023

THE UNITED STATES OF AMERICA.

To all whom these presents shall come, Greetings:

WHEREAS. a Certificate of the Register of the Land Office at Coeur d'Alene, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled, "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for the Northeast quarter of Section twenty-six in Township forty-seven north of range three west of the Boise Meridian, Idaho, containing one hundred sixty acres. according to the Official Platt of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises,

and in conformity with the several Acts of Congress in such cases made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington, the Thirtieth day of October, in the year of our Lord one thousand nine hundred and thirteen

and of the Independence of the United States the one hundred and thirty-eighth.

By the President,

WOODROW WILSON.

By M. P. LeROY.

L. A. C. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 363017.

IV.

The defendant has, at all times since the issuance of said patent, held title to said lands, therein described, under said patent and has owned, possessed and occupied said premises under said patent and grant and in accordance with the title and rights thereby granted, conveyed and conferred, and now so holds the same.

WHEREFORE defendant prays:

That the plaintiff's action be dismissed and it take nothing thereby and that defendant be given his costs and disbursements herein.

J. F. AILSHIE,

RAY AGEE,

Attorneys for Defendant, Residence and Post Office Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,)

) ss.

County of Kootenai,)

John Swendig, being first duly sworn, on his oath deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing

answer, knows the contents thereof and believes the facts therein stated to be true.

JOHN SWENDIG,

Subscribed and sworn to before me this 23rd day of October, 1920.

(Seal)

M. W. FROST,

*Notary Public, in and for the
State of Idaho, residing at
Harrison, Idaho.*

Endorsed: Filed October 27, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

MOTION TO DISMISS.

Now comes the defendant and moves the Court to dismiss plaintiff's pretended action herein for the reasons and upon the grounds following:

I.

That the complaint does not state facts sufficient to entitle plaintiff to any relief whatever. That it appears upon the face of the complaint that defendant holds a patent from the United States for the fee simple title and Estate in and to the whole of the lands over which plaintiff's pole, power and telephone line extends and that at the time of the issuance of said patent the United States made no reservation of title whatever, either to itself or for the use or benefit of plaintiff or any one else for a power line, telephone or pole line of any kind. That

it appears upon the face of the Complaint that plaintiff has no grant or easement of any kind from the defendant's grantor the United States, or from defendant or any one to go upon or maintain its pole, power or telephone line on or across defendant's land.

II.

That the Honorable Secretary of the Interior had no power or authority of law to give or convey title, or an easement or an irrevocable license to plaintiff for the purpose of maintaining a power, pole, telephone, transmission or other lines across said lands and that he did not and could not do so and that the United States has parted with all its right and title in and to said lands and that by said grant the Honorable Secretary of the Interior has lost all power of control or supervision over said land and any license or permit to any one to go upon or across the same has been thereby revoked and that the issuance of patent was a revocation of all previous permits and licenses given or granted.

III.

That no reservation of any title or right was made in or by said patent and that no implied reservation did arise, or was made and that none exists and that any such reservation is inconsistent with the terms of the grant contained in defendant's said patent.

WHEREFORE, defendant prays that plaintiff's pretended action be dismissed and its complaint be

held for naught and that defendant be awarded his costs herein.

J. F. AILSHIE,
WM. H. BONNEVILLE,
*Attorneys for Defendant, P.
O. Address, Coeur d'Alene,
Idaho.*

Endorsed: Filed, June 7, 1920.

W. D. McREYNOLDS, Clerk.

By. L. M. Larson, Deputy.

(Title of Court and Cause.)

MEMORANDUM DECISION UPON MOTION
TO DISMISS.

Sept. 18, 1920.

John P. Gray and

W. F. McNaughton,

Attorneys for Plaintiff.

J. F. Ailshie,

Attorney for Defendant.

DIETRICH, DISTRICT JUDGE:

Admittedly the motion to dismiss in this case involves precisely the same question that was disposed of in Washington Water Power Company v. Harbaugh, 253 Fed. 681, but in view of the earnestness with which counsel for the defendant has represented it, I have given it additional consideration. While, as originally suggested, the question is not entirely free from doubt, I am not convinced that the conclusion reached is erroneous. It is

true that the patent upon its face purports to be absolute, but as pointed out in the Harbaugh case, at the time it was issued there was in force the following express general regulation: "The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." I am inclined to think that the defendant took his patent subject to the reservation thus provided for, and that in effect his status is the same as it would have been had the language of the regulation been written into the patent. There cannot, at this stage at least, be any contention that the defendant was ignorant of the plaintiff's interest, for it was in open possession of the right of way and was using the same; and it must be assumed that the defendant knew of the regulation. What view should be taken in a case where the patent issued prior to the promulgation of the regulation need not be discussed.

Accordingly, the motion will be denied, and a like order will be entered in each of the cases numbered 752, 753 and 755.

Endorsed: Filed Sept. 18, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STATEMENT OF CASE.

Be it remembered that on the 23rd day of May, 1921, the case of Washington Water Power Company, a Corporation, vs. John Swendig, No. 752; the case of Washington Water Power Company, a corporation, vs. James W. Miller, No. 753; the case of Washington Water Power Company, a Corporation, vs. Remigus Grab, No. 754, and the case of Washington Water Power Company, a Corporation, vs. Anthony Kerr, No. 755, and each of them came on for trial before the Court without a jury at Coeur d'Alene, Idaho. John Gray appearing for plaintiff and J. F. Ailshie and Ray Agee appearing for each of the defendants.

It appeared that the same question was involved in each of said cases, and upon stipulation of attorneys, in open Court, the cases were consolidated by order of the Court for trial upon both law and the facts for all purposes in this and all Courts, and for all purposes as entitled above, and thereupon the following evidence was introduced, and the following proceedings had, as hereinafter set out in this statement of the case, to-wit:

FRANK LANGLEY, a witness called and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am Register of the Government Land Office in this city. I have under my charge the plats of

townships in this land district. I have with me plats of townships 42-7 and 47-3 West. These plats are official records of our office. Said plats were thereupon offered in evidence by Mr. Gray as Plaintiff's Exhibits No. 1 and 2 and leave asked to substitute certified copies.

MR. AILSHIE: I object to this as incompetent and immaterial, and not only that, but it tends to incumber the record, and it covers matters that are not in issue here. It only affects the lands of one quarter section of land involved here, and there is no issue as to the power line running across the lands that we have taken patents for.

MR. LANGLEY: These plats are now in the condition in which they were when they were first filed in our office in so far as showing the power line across the plats. The electric power line shown on the two plats was there when it was filed in our office. This is not the original plat that was filed. It is a certified copy. The original was destroyed by fire in October, 1911, and the tract books in the office show the date of filing of the original plats. For township 47-2 West, the filing date is May 2, 1910. For 47-3 West, it is May 2, 1910. These plats are copies, certified to by the Recorder of the General Land Office, filed to replace the old original plats that were burned in the fire.

Offered in evidence.

Objection overruled; Plaintiff's exhibits 1 and 2 admitted.

Thereupon the Court granted exceptions to both parties to all adverse rulings, including the foregoing ruling.

MR. LANGLEY: This is the copy of a circular with respect to entries of lands in the Coeur d'Alene Indian reservation, issued by Mr. Witten, with respect to entries being subject to railroad rights of way and power transmission lines. I did not look for the original. It came with a letter from the Commissioner of the General Land Office.

Q. Are you able to tell the date that circular was originally issued?

Objected to as not the best evidence of the date when issued.

Objection overruled.

A. I am not able to tell the date. I might be able to find the date. I haven't looked for it. I have such circular with reference to the Coeur d'Alene Indian Lands in my files. The one I have found is attached as an exhibit to a letter from the Commissioner of the General Land Office, dated July 8, 1921, I do not know whether or not one of these was received at any previous time.

Q. Is the certified copy which I have here a copy of the letter which you have in your files?

Objected to as not the way to prove copies.

Sustained.

MR. GRAY: Well, I will offer that in evidence, and in lieu of it I will offer a certified copy.

Objected to as incompetent to prove any facts in issue, and on the ground that it was not issued by the Secretary of the Interior or the Commissioner of the General Land Office, and hasn't the force or effect of an executive order or an order of the Department, and upon the further ground that this circular provides that, "All lands for which rights of way have been obtained for railroads or power transmission lines must be entered subject to such rights of way," and the permit for power transmission is only a license and not an easement.

Received subject to the objection which was to be considered later.

CROSS-EXAMINATION.

By Mr. Ailshie.

I have no memory of the original plat of which this is a certified copy. I couldn't identify or remember any particular line or thing that is on this copy. I cannot say of my own knowledge whether or not these lines indicating a power line were on there when the original plat was filed in our office.

Thereupon a certain plat was marked

PLAINTIFF'S EXHIBIT NO. 4.

MR. GRAY: I desire to offer in evidence a map, the original easement and grant from the Secretary of the Interior to the Washington Water Power Company, for a telephone line across the Coeur d'Alene Indian reservation, marked for identification as Plaintiff's Exhibit No. 4.

Objected to as not identified or proven to be a plat or map issued, or permit granted by the Department.

Overruled; Plaintiff's Exhibit No. 4 admitted. Thereupon certain papers were marked

PLAINTIFF'S EXHIBITS NOS 5, 6, 7, 8, 9, and 10.

MR. GRAY: I desire to offer in evidence a file of correspondence marked Exhibits 5 to 9, inclusive, and Plaintiff's Exhibit No. 10, the voucher for \$224.00 of the Washington Water Power Company, received by E. A. Hitchcock, Secretary of the Interior, showing the appraisal of damages for that right of way, and the payment to the Government of the United States.

MR. AILSHIE: I object to each of the offered exhibits not because it is not shown that they are what they purport to be, but because they are incompetent to prove any issue in the case and not the best evidence.

Overruled; Plaintiff's Exhibits 5 to 10 inclusive, admitted.

Thereupon a certain paper was marked

PLAINTIFF'S EXHIBIT NO. 11.

MR. GRAY: I desire to offer the permit, a certified copy of the permit for a power transmission line over the Coeur d'Alene Indian Reservation.

THE COURT: I don't know that this correspondence is identified with this particular right of way, gentlemen.

MR. GRAY: I will do that later, if Your Honor please. This is a certified copy of the original.

EUGENE LOGAN, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am a civil engineer residing in Spokane. I was educated at Washington State College. I have been engaged in the practice about thirteen or fourteen years. At present I am engineer for the Washington Water Power Company. I have been with the company about thirteen years. I am familiar with the telephone line and the power transmission line in question here. This is the only line across the Coeur d'Alene Indian reservation. Both lines are on one line of poles. I have seen Plaintiff's Exhibit 4 and also Exhibit 11. I have surveyed that line out since. The lands were subdivided into townships and sections and other legal subdivisions. I have a map showing the line as it crosses the lands of the defendants. I have surveyed it across the lands of each defendant. It is the same line that is shown upon Exhibits 4 and 11, and in the same place. I made the survey in 1909. The Company has never had any other telephone line or power transmission line, across the Coeur d'Alene Indian Reservation and these lines have been located in the same position ever since I have been with the company. I have maps show-

ing the line as it crosses the individual lands of the defendants. These two maps show the line across the lands of the four defendants.

PLAINTIFF'S EXHIBITS NOS. 12 and 13 were then offered in evidence.

Objected to on the same grounds as other objections to exhibits.

Overruled, and Plaintiff's Exhibits 12 and 13 were admitted.

CROSS-EXAMINATION.

By MR. AILSHIE.

I made the last survey in 1909. I was through there last fall. I haven't made any survey since that time. The telephone wires and transmission wires are on the same poles. The current carried over that line is approximately sixty thousand volts. These poles are principally thirty-five foot poles, with a seven-inch top. There is one transmission wire that is on an insulator which sets on top of the pole. It is a three-wire transmission. The other two are on a single cross arm. The telephone wire is on another cross arm either seven or nine feet below the transmission wire. I do not know which was constructed first, the transmission line or the telephone line. They were on there the first time I was there. They would not be likely to put in poles of that size if it was constructed for a telephone line in the first place. Those are not standard telephone poles.

RE-DIRECT EXAMINATION.

By MR. GRAY.

I couldn't see any difference in the position of the line last fall and when I made my survey.

JOHN B. FISKEN, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am an electrical engineer residing in Spokane. I was educated at the Government College in Glasgow, Scotland, and I have followed it since 1886—35 years. I had charge of the construction of the Washington Water Power Company's lines from about 1904 until three years ago. I had charge of the maintenance and operation of all the transmission lines up to about three years ago. I have been with the Washington Water Power Company since 1887. The first power line was finished in the Coeur d'Alenes in the summer of 1903. I am familiar with the manner of construction of this line. It is necessary to watch the condition of the line, to anticipate repairs and renewals, and make repairs at the time of the patrol, if it can be done, and generally to see that the line is in shape to give service. We have to watch for the condition of the insulators, to note whether they are cracked or not, whether any of the tie wires, which tie the conductors to the insulators, are coming off or not, to note the condition of the insulators on the telephone line and also the tie wires, to see that there is

no liability of the telephone line or the transmission lines getting tangled up; to note the condition of the poles from the ground up, and on occasion to make tests of the poles below the ground line; to note the condition of the surroundings of the poles, from fire risk standpoint; also from the standpoint of safety in case of washouts.

Q. Mr. Fiskien, does that line serve any important use? If so, what?

Objected to as immaterial and incompetent.

Overruled.

It serves the Coeur d'Alene Mining District, the mines, mills, smelters, and dredges, besides the distribution systems in Kellogg and Wardner, Osborne and Wallace. That line was always patrolled while I was in charge. It was usually patrolled by a man on horseback, and sometimes on snowshoes. This practice continued from 1903. The patrolmen were located along the line at intervals, depending upon the difficulties of getting along the patrol road. They always carried a telephone and their body tools, some small insulators and a little wire. At times they would have more than that, but that was the regular equipment. A patrolman could make any repairs on the telephone line at any time, and he could repair poles. He could not handle the high tension transmission wires. Service had to be interrupted to do it. There was a patrol road established when the line was built. It was close to the poles wherever it could be. There were a few

places where it was impossible to put a patrol road right along the line. It is necessary to have a patrol road along a transmission line, with the right to freely go along it. It is necessary to use a road or right of way for the repair of the lines, it is necessary to enable repair materials to be hauled in. It is necessary to repair poles occasionally. The average life of a pole is about 15 years. A patrolman should pass not more than fifty to seventy-five feet from the line. The right of way should be a minimum of fifty feet on each side of the line. It is necessary in timbered country to enable men to get in there in case of fire in the adjacent timber. It is necessary for replacing either permanent or temporary guys, and for raising poles.

CROSS-EXAMINATION.

By. MR. AILSHIE.

I don't know whether or not there has even been any road through any of the places owned by these defendants. I did not patrol the line at that point. All I know is that I have employed men up there for that purpose. I do not know where these premises are. We would need fifty feet on each side of the line through a man's field. It is necessary for guys and handling the poles. I don't know whether or not we have used it in this particular location. A great many of the poles in this location have been stubbed. Some have been replaced.

LEROY HOOPER, a witness produced and sworn on behalf of the plaintiff, testified as follows:

EXAMINATION.

By MR. GRAY.

I am a patrol man for the Washington Water Power Company, residing at Medimont, Idaho. I patrol from Rose Lake on the East to the St. Joe River on the West. I patrol the complete line once a week when weather conditions permit. I make repairs both permanent and temporary. I haven't replaced any poles since I have been on the job, but I have stubbed some of them. I have been working there since the 19th day of September, 1920. I have stub-poles which have broken off and partially fallen over. I patrol for anything unusual along the line, either growth of trees, or broken insulators, wires, or poles leaning over. I observe the conditions of the poles as I go along. I should pass within not more than one hundred feet from the poles. I have not been able to travel along there on my horse or wagon that close to the line. In places there are solid fences, and no gates. I follow the road. The only way I can follow the pole line is on foot. It is necessary to go along the pole line to replace a pole, with a team, at least one horse.

CROSS-EXAMINATION.

By MR. AILSHIE.

I have been acquainted with the patrol line

through the places of the defendants since last September. I was over the line with a previous patrol man a number of times before that. I do not know whether or not there has ever been a patrol road along the line through there or not. My recollection is that in patrolling with my brother, about nine years ago, we followed the pole line with a buggy. I couldn't say who owns the land over which we crossed. We patrolled with a buggy, and followed the pole line. I was not familiar, at that time, with who owned the lands. We could go practically the whole line. The country is rolling through there. It is not passable with the buggy at the present time. I was speaking of nine years ago. The road in some places at the present time is a quarter of a mile from the pole line. We go in there on foot. It has not always been the same. The first time I saw it, about nine or ten years ago, we practically followed the pole line from the top of the hill above Medimont to the brow of the hill overlooking the St. Joe River near Chatcolette, South of Harrison.

RE-DIRECT EXAMINATION.

By. MR. GRAY.

The road East of Mr. Swendig's place follows or crosses the power line. I follow that road past his place, the road passes to the North, and I follow the road until I come to Mr. Miller's land, when I enter his land, which I think is at the corner, and

then I come back to the power line and after winding back of Miller's house and barn, I get to the power line. I follow the public road. It takes me in places half a mile from the line; the timber is so thick that I can't see the line in places for four or five miles at a stretch. If I want to go over the line I have to get out and walk over to it. The ground along the pole line across Swendig's place was plowed up when I went through in April.

RE-CROSS EXAMINATION.

By MR. AILSHIE.

When I spoke of four or five miles through timber, I did not refer to Swendig's place. It was three or four miles East of his place, over toward Kellogg.

RE-DIRECT EXAMINATION.

By MR. GRAY.

The power line runs diagonally across Swendig's place, and when the power line crosses the road of course I am at the line, and then I go straight ahead along the road which I think is a section line and I will be a quarter of a mile from it at the greatest distance. I don't know Kerr's land and Grab's land by the description from the map, but I know where it lies in reference to the power line. The public road is about half a mile to a mile from the power line as it crosses Kerr's place.

ALBERT H. BECKWITH, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am an electrical engineer, residing at Spokane, Washington. I was educated at McGill University, Montreal, and have been practicing since May, 1906. I am assistant to the Superintendent of Light and Power with the Washington Water Power Company. I am familiar with the line of the Company which extends across what was formerly the Coeur d'Alene Indian reservation, also across the lands of the defendants. I was over that line about a week ago. I have been assistant on the maintenance work since 1918. We have maintained a patrol along that line all the time. It is necessary to patrol this line because the poles are now getting to an age that they are deteriorating very rapidly, and we have to stub them. We have to observe broken insulators, broken wires, and keep our telephone line operating properly, to keep in communication with the Coeur d'Alene Mining District. A patrolman should pass immediately along the line. A patrol road is necessary to enable us to drive along the line, because we have to haul subs and wire and hardware for making necessary repairs, or if poles burn down, we have to haul poles in on the line to replace the ones burned down. Some-

times the entire poles have to be taken in, in place of stubs. The right of way should be one hundred feet wide. So that in case a pole falls over it may be replaced by a new one, you would have to use that much ground, fifty feet on the side of the line, at least, to get another pole up into place again and get that one out of the way. Here and there we have to put temporary guys on, and they have to be set back from the line far enough so that they will hold the pole in position. The contour of the country is not always such that we can run right along at the foot of the poles.

E. S. CRANE, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I reside at Coeur d'Alene, and am right of way agent for the Washington Water Power Company. I have been working for the company for sixteen years. The Company did not build any other telephone line or power line across the reservation other than the high power line. It was built in 1902 and 1903. I know the lands of the four defendants. There was a patrol road built all the way along that line, and it was the only road that was built into that country to that day, up to 1910. It was the only road. It crossed the lands of the defendants before they filed on them. I was over their lands last year. Some of it was plowed up.

The patrol road is fenced off. I went around a different road, the County road, I think it is. The power line is at the same place as it originally was. The right of way for this telephone and power line across the reservation was appraised by Major Anderson. He was Indian Agent, I think his headquarters were at Spokane, but he had charge of the Coeur d'Alene Indian Reservation.

MR. GRAY: I desire to offer a certified copy of the letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated August 23, 1912.

Objected to on the ground that it is incompetent to prove any easement or franchise or other right in the real estate in question.

Overruled; Plaintiff's Exhibit 14 admitted.

J. W. MILLER, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE.

I am one of the defendants. I made entry upon the tract of land described in the complaint served on me; also final proof. Defendant's Exhibit No. 1 is the patent that was issued to me for this land.

Defendant's Exhibit No. 1 admitted in evidence and copy thereof contained in answer substituted for original patent.

I have been the owner of this land ever since I received my patent for it. I am still the owner and have been in possession of it during all that time.

CROSS-EXAMINATION.

By MR. GRAY.

This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time.

JOHN SWENDIG, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE.

I reside on a farm at Harrison, and I am one of the defendants. I filed and made final proof on the land described in the complaint against me. I also received patent for it. Defendants' Exhibit No. 2 admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

I have owned this land ever since I received patent for it. and am still the owner. I have been in possession of it all the time since I first entered it. There has not been exactly a road along the pole line. It was passable at all times. I don't know that I ever remember of a road being there.

CROSS-EXAMINATION.

By MR. GRAY.

When I first settled here, this pole line, power transmission line and telephone line were constructed across the land. I don't know whether or not it was there when I made my entry. I was not sure of my lines. The power line was there at that time. I don't remember whether or not the line was shown on the plat in the land office or not. I examined the plat. I don't remember about the power line. I did not consider it at that time. It was there before I settled.

REMIGUS GRAB, a witness produced and sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE:

I live at Harrison on a farm. I am one of the defendants. I made entry on the lands described in the complaint served on me. I made final proof on the same. Defendants' Exhibit No. 3 is the patent that was issued to me for this land.

Defendants' Exhibit No. 3 was thereupon admitted in evidence and the copy thereof included in the answer substituted for the original patent.

I have owned that land ever since I received the patent and am still the owner. I have been in possession of it all that time.

CROSS-EXAMINATION.

By MR. GRAY.

When I settled on the land the power line of the Washington Water Power Company ran across it. I didn't know it at first but I saw it was there when I filed on it. It has been there ever since.

RE-DIRECT EXAMINATION.

By MR. AILSHIE.

I filed on it here at Coeur d'Alene. I asked them about the power line, and they told me I couldn't fence it up so long as the government owned it. They told me that when I had a patent for it then I could do as I pleased with it. No one would have any rights to it.

RE-CROSS EXAMINATION.

By MR. GRAY.

The people in the land office told me that. I don't know who the officer was. And I asked them about the road and about getting through the place, and they said I couldn't fence it up so long as it belonged to the Government, yet, and when I get a patent it is my own, and I am the boss myself on it. Mr. Whitney made that statement, a couple of them there made it.

MR. GRAY: I move to strike that out if Your Honor please.

Motion sustained.

ANTHONY KERR, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By. MR. AILSHIE.

I reside at Harrison, Idaho, on a farm. I am one of the defendants. I filed upon the tract of land described in the complaint which was served on me in this action, and made final proof upon it. I received a patent for the land. It is the document marked Defendants' Exhibit No. 4. I have owned that land ever since, and am still the owner of it, and have been in possession of it ever since that time.

Thereupon Defendant's Exhibit No. 4 was admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

CROSS-EXAMINATION.

By MR. GRAY.

The power line and telephone line had been constructed across that land when I first saw it. I knew it before I filed on the land. It has been there ever since.

MR. AILSHIE: I now offer in evidence a certified copy of the order and decision of the Secretary of the Interior, of date April 23, 1921, construing and passing upon the effect of the order of August 24th that has just been introduced by plaintiff.

Objected to on ground that it doesn't construe the order of August 24th.

Overruled; and Defendants' Exhibit No. 5 admitted in evidence, which is a copy of the certified copy of said order and decision, dated April 23, 1921.

And be it further remembered that the foregoing comprises all the evidence that was introduced or considered upon the trial of said consolidated causes.

And now come the defendants and submit the foregoing draft of statement of case and exceptions and pray an order settling the same.

Dated this 24th day of June, 1921.

J. F. AILSHIE, and
RAY AGEE,

Residing at Coeur d'Alene, Idaho.

Attorneys for Defendants.

Settled, allowed and ordered filed as Statement of Case and Exceptions this 26th day of July, 1921.

FRANK S. DIETRICH,
District Judge.

Lodged June 24, 1921.

W. D. McREYNOLDS, Clerk.

By L. M. LARSON, Deputy.

Endorsed: Filed July 26, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

The above causes came on to be heard before the Court at Coeur d'Alene, Idaho, on the 23rd day of May, 1921.

It appeared that the same question was involved in each of said cases, and the attorneys for the parties stipulating thereto and the Court believing that it was proper that said causes be consolidated, it was ordered that the said four cases be consolidated and tried as one case.

Thereupon the Court heard the evidence adduced by the parties and the argument of counsel, and the case having been submitted for the decision of the Court, and the Court having heretofore made its decision herein, and now being well advised in the premises, upon consideration thereof,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the permit granted and given by the Secretary of the Interior of the United States to the plaintiff, The Washington Water Power Company, in pursuance of the provisions of the Act of Congress of February 15, 1901 (31 Stat. at Large, 790) and dated July 7, 1902, for a right of way across and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation, and over and across, together with other lands, the

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. is a valid and subsisting permit and in full force and effect, and the plaintiff, The Washington Water Power Company, is in possession of said right of way and of said power transmission line constructed over and along said right of way and is the owner of said permit and power line.

(2) That the plaintiff, The Washington Water Power Company, is the owner of a right of way easement for a telephone line upon and across, together with other lands, the said

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township N. R. 2, W. B. M. which easement for right of way was acquired by the plaintiff under the provisions of Section 3 of an Act of Congress approved March 3rd, 1901, entitled "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with va-

rious Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which said right of way easement was granted by the Secretary of the Interior of the United States under date of April 15, 1902, and which said right of way is identical with the said right of way for the electric power transmission line, referred to in paragraph 1 of this decree, and said telephone as now constructed is incidental to the use of the said power transmission line, and the said right of way easement so granted is now in full force and effect and is a valid and subsisting easement for right of way.

(3) That the plaintiff is entitled to maintain along said power transmission line and telephone line a roadway, which said roadway must be within fifty feet of the center of said line as the same is now constructed over and across the lands described as follows:

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. and the agents, servants and employes of the plaintiff are entitled to go along said power transmission line at all times and to keep and maintain said roadway for such purpose.

(4) Plaintiff is further entitled, in making repairs or renewals, to the use of such land within fifty feet of the center of said line as may be necessary for renewals.

(5) That the title of the defendant, John Swendig to the land described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, James W. Miller, to the land ndescribed as the North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Remigus Grab, to the land described as the Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Anthony Kerr, to the land described as Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M., is subject to the foregoing rights of the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any one of the defendants maintains any fence or fences on, around or across said lands, he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where

said roadway passes through any such fence, and the plaintiff shall furnish locks and keep said gates locked.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendants and each of them, and all persons acting under the authority of any of them, or pretending so to act, and all successors in interest of said defendants and of each of them, be and they hereby are perpetually enjoined and restrained from interfering with the plaintiff in the operation and maintenance of the said electric power line and said telephone line and said patrol road over and across the said lands described as follows:

The Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southeast quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M.,

and from interfering with the agents, employes and officers of said plaintiff in patrolling and inspecting the said line and going along said roadway at any and all times, and from in any manner interfering with the plaintiff in making repairs or renewals thereof or in conveying materials therefor along said road.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of the plaintiff shall be limited to a strip of land fifty feet on each side of said electric power transmission line as the same is now located upon the ground, and that subject to the plaintiff's reasonable needs for the uses herein defined, the defendants shall have the right to occupy and utilize said strip of land, and the plaintiff and its employes in going along said road must use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within fifty feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line. In making repairs or renewals reasonable care shall be exercised not to do unnecessary damage to crops growing along and near the line.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover its costs herein taxed as follows:

Against the defendant, John Swendig.....\$53.29

Against the defendant, Remigus Grab.....\$40.69

Against the defendant, Anthony Kerr.....\$40.69

Against the defendant, James W. Miller....\$40.69

Dated this 26th day of May, 1921.

F. S. DIETRICH,

Judge.

Endorsed: Filed May 26, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

TO THE HONORABLE FRANK S. DIETRICH,
DISTRICT JUDGE:

The above named defendants, and each of them, feeling aggrieved by the decree rendered and entered in the above entitled consolidated causes on the 26th day of May, 1921, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they, and each of them, pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioners, and each of them, further pray that the proper order relating to the required security to be required of them be made.

J. F. AILSHIE,

RAY AGEE,

Attorneys for Defendants.

Residence and P. O. Address,
Coeur d'Alene, Idaho.

Appeal allowed upon giving bond as required by law for the sum of \$200.00.

Dated this 11th day of August, 1921.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

ON MOTION of J. F. Ailshie and Ray Agee, solicitors and counsel for defendants, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all other proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of \$200.00.

Dated this 11th day of August, 1921.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed, Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

NOW COME the defendants in the above entitled cause and file the Assignment of Errors upon which

they will rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of May, 1921, as follows:

I.

That the Court erred in holding that plaintiff's complaint herein states causes of action against these defendants, and in over-ruling and denying defendants' motions to dismiss said alleged causes of action.

II.

That the Court erred in holding and decreeing that the permit granted to plaintiff for a right of way across the lands of defendants, and each of them, for the construction and maintenance of an electric power transmission line is a valid and subsisting permit in force and effect since the issuance of patent.

III.

That the Court erred in holding and decreeing that plaintiff is the owner of a right of way and easement for a telephone line upon and across the respective lands of these defendants.

IV.

That the Court erred in holding and decreeing that plaintiff is entitled to maintain a roadway along the power transmission line described in the said decree.

V.

That the Court erred in holding and decreeing that plaintiff is entitled to the use of land within fifty feet of the center of said power line in making repairs and renewals.

VI.

That the Court erred in holding and decreeing that the title of these defendants, and each of them, to the lands described in the decree herein is subject to any rights of plaintiff.

VII.

That the Court erred in holding and decreeing that these defendants must maintain gates for the use of plaintiff.

VIII.

That the Court erred in allowing and granting to plaintiff an injunction enjoining defendants from interfering with plaintiff in its operation and maintenance of said electric power transmission line, telephone line and patrol road over and across their respective lands.

IX

That the evidence introduced upon the trial of the cause is not sufficient to support the decree herein.

X.

That the Court committed error upon the whole record in holding that defendants were not entitled

to the relief asked for in their various answers and in granting relief to plaintiff.

XI.

That the Court erred in refusing to find, hold and decree that the issuance of patents to defendants by the Government was in law and effect a revocation of the prior permit issued by the Secretary of the Interior to plaintiff and that defendants took title freed from any and all burdens resulting from such permits.

JAS. F. AILSHIE,

RAY AGEE,

Attorneys for Appellants.

Residence and P. O. Address,

Coeur d'Alene, Idaho.

Endorsed: Filed, Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, THAT WE, John Swendig, James W. Miller, Remigus Grab and Anthong Kerr, as principals, and L. G. Sunkel and D. R. Frost as sureties, of the county of Kootenai, State of Idaho, are held and firmly bound unto the Washington Water Power Company, a Corporation, the above-named plaintiff, in the sum of Two Hundred Dollars lawful money of the United States, to be paid to it and its

On the 11th day of August, 1921, personally appeared before me, L. G. Sunkel and D. R. Frost, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said L. G. Sunkel and D. R. Frost, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said County of Kootenai and that he is worth the sum of Two Hundred Dollars over and above his just debts and legal liability and property exempt from execution.

L. G. SUNKEL,
D. R. FROST.

(SEAL)

Subscribed and sworn to before me this 11th day of August, A. D. 1921.

M. W. FROST,

(SEAL)

Notary Public.

The within bond is approved both as to sufficiency and form this 18th day of August, 1921.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Aug. 18, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION ON APPEAL.

UNITED STATES OF AMERICA,
TO THE WASHINGTON WATER POWER COM-
PANY, A CORPORATION, DEFENDANT,
and
TO JOHN P. GRAY, ITS ATTORNEY,
GREETING:

YOU ARE HEREBY NOTIFIED, that in certain consolidated cases in equity in the United States District Court, in and for the District of Idaho, Northern Division, wherein the Washington Water Power Company, a Corporation, is plaintiff and the above-named defendants, and each of them, are defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Court at the City of San Francisco, State of California, on the 10th day of September, 1921, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS The Hon Frank S. Dietrich, United States District Judge for the District of Idaho,

Northern Division, this 11th day of August, 1921.

FRANK S. DIETRICH,
*United States District Judge for
the District of Idaho, Northern
Division.*

Service accepted August 13, 1921.

JOHN P. GRAY,
Attorney for Plaintiff.

Endorsed: Filed Aug. 18, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

YOU ARE HEREBY DIRECTED to prepare a transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action of the following papers on file in your office, to-wit:

1. Complaint against John Swendig.
2. Paragraph X. of Complaint against James W. Miller.
3. Paragraph X. of Complaint against Remigius Grab.
4. Paragraph X. of Complaint against Anthony Kerr.
5. Answer of John Swendig.
6. John Swendig's Motion to Dismiss.
7. Order Overruling Motion to Dismiss.
8. Statement of Evidence, and Order Settling

and Allowing the Same.

9. Decree.
10. Petition for Appeal.
11. Order Allowing Appeal.
12. Assignment of Errors.
13. Bond on Appeal.
14. Citation on Appeal.
15. Minutes of the Court.
16. Clerk's Certificate.

YOU ARE HEREBY FURTHER REQUESTED AND DIRECTED to certify to the United States Circuit Court of Appeals for the Ninth Circuit, all exhibits and certified copies of exhibits in said cause, including Defendants' Exhibits 1 to 5, inclusive, and Plaintiff's Exhibits 1 to 14, inclusive.

Dated this 12th day of August, 1921.

JAMES F. AILSHIE,
RAY AGEE,

Solicitors and Counsel for Defendants,
Residing at Coeur d'Alene, Idaho.

Service accepted August 13, 1921.

JOHN P. GRAY,

Attorney for Plaintiff.

Residing at Coeur d'Alene, Idaho.

Endorsed: Filed Aug. 18, 1921.

W. D. McREYNOLDS, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings

in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

Clerk.

DEFENDANT'S EXHIBIT NO. 1

4—1023

Coeur d' Alene 04017

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETINGS:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, James W. Miller, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the East half of the Northwest quarter and the North half of the Southwest quarter of Section twenty-six in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the Twenty-third day of January, in the year

of our Lord one thousand nine hundred and fourteen and the Independence of the United States the one hundred and thirty-eighth.

(SEAL)

By the President,

WOODROW WILSON

By M. P. LeROY,

Secretary,

JOHN O'CONNELL,

Acting Recorder of the General Land Office.

RECORDED: Patent Number 378945.

Endorsed: Filed May 23, 1921.

W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 2.

4—1023

Coeur d' Alene 03983

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of Public Lands," and the acts supplemental thereto, for the Northeast quarter of Section

twenty-six in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the Thirtieth day of October, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-eighth.

(SEAL)

By the President,

WOODROW WILSON

By M. P. LeROY,

Secretary,

L. Q. C. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 363017.

Endorsed: Filed May 23, 1921.

W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 3.

4—1023

Coeur d' Alene 04127

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been de-

posited in the General Land Office, whereby it appears that full payment has been made by the claimant, Remigus Grab, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the Northeast quarter of Section twenty-four in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized

and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-fourth day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States the one hundred and thirty-seventh.

(SEAL)

By the President,

WILLIAM H. TAFT,

By M. P. LeROY,

Secretary,

H. W. CANFORD,

Recorder of the General Land Office.

RECORDED: Patent Number 293389.

Endorsed: Filed May 23, 1921.

W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 4.

4—1003

Coeur d'Alene 07111.

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Anthony Kerr has been established and duly consummated, in conformity to law, for the Lot two, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter of Section nineteen in Township forty-seven north of Range two west of the Boise Meridian, Idaho, containing one hundred fifty-nine and eighty-nine-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE, by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof unto the said claimant and to the heirs and assigns of the said claimant for-

ever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal and oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the Fifteenth day of October, in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States the one hundred and Forty-third.

(SEAL)

By the President,
WOODROW WILSON,

By M. P. LeROY,
Secretary.

L. C. Q. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 650553.

Endorsed: Filed May 23, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the district of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 100, inclusive, contains true and correct copies of that portion of the pleadings and proceedings in the above consolidated cause as requested by the praecipe filed herein, and that the same constitute the transcript of the record herein upon appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$118.25, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 9th day of September, 1921.

(SEAL)

W. D. McREYNOLDS,

Clerk.

Plaintiff's Exhibit No. 14.

Admitted.

[Endorsed]: U. S. District Court, District of Idaho. Filed May 24, 1921. W. D. McReynolds, Clerk. By _____, Deputy.

No. 3769. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 27, 1921. F. D. Monckton, Clerk.

4-207.

B.

M. E. L.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

September 11, 1912.

I hereby certify that the annexed copy of the Secretary's order dated August 23, 1912, is a true and literal exemplification from the original paper in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

S. V. PROUDFIT,
Acting Commissioner of the General Land Office.

(Stamp:)

259635

Received GLO. Aug. 24, 1912.

Referred to _____

Assigned to _____

Answered by _____

Aug. 23, 1912.

DEPARTMENT OF THE INTERIOR.
WASHINGTON.

The Commissioner of the General Land Office.

Sir:

“Regulations concerning Right of Way over Public Lands and Reservations for Canals, Ditches, and Reservoirs and Use of Right of Way for Various Purposes,” approved June 6, 1908, embraced (paragraphs 37 to 45, inclusive) regulations under the Act of February 15, 1901 (31 Stat., 790), entitled

“An act relating to rights of way through certain parks, reservations, and other public lands.”

This statute authorizes and empowers the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California,

“for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe-lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacture or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground

occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe-lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named."

The statute expressly provides:

"That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

Paragraph 43 of the regulations above referred to contained the following provision:

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract."

By letter of May 7 to you, amending said paragraph 43, the provision last above quoted was omitted. Upon further consideration it is deemed advisable to further amend the regulations in this particular.

By the Forest Transfer Act of February 1, 1905, sec. 1 (33 Stat., 628), the administration of the Act of February 15, 1901, so far as it affects forest reservations was transferred to the Department of Agriculture. That Department has never adopted that provision of the former regulations of this Department last above quoted.

In view of the permanent character of the works authorized to be constructed under the Act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development through the device of making permits revokable in his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that

“the final disposal by the United States of any tract traversed by the premitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract,”

was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject to that of the final patentee of the land occupied under the permit and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43 above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private land owner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in the legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to provide a different rule if in its judgment under the circumstances the public welfare required it.

In this connection, attention is called to the provision of the Act of August 30, 1890 (26 Stat. 391), which reads as follows:

“In all patents for lands hereafter taken up under any of the land laws of the United States . . . west of the One Hundredth Meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.”

It is to be noted that this reservation was required by a statute passed more than eleven years before the statute under which these permits are issued, and that the words of the reservation are not limited to ditches and canals constructed by the United States but are expressly extended to those constructed by “the *authority*” of the United States. This statute clearly shows that Congress, at a comparatively early date, realized the necessity of providing permanent reservations for ditches and canals. Doubtless the primary purpose in view was to safeguard the future construction of ditches and canals upon lands taken up before the construction should be authorized, by making all public lands thereafter taken up in the arid region subject to a public easement for that purpose whenever the Government should deem it wise to authorize such construction, as has since been done by the Reclamation Act of 1902; but it is clear that Congress realized and meant to provide against acquisition of adverse rights after construction which, though later in time, might otherwise be claimed to be prior in law to the ditch right. I am of the opinion that a ditch or canal constructed under permit issued under the Act of February

15, 1901, is protected by the Act of August 30, 1890, against any adverse claim set up by a subsequent patentee of the land traversed by the canal or ditch, and that this protection will continue at least until the Secretary of the Interior shall revoke the permit which authorized the construction of the canal or ditch. Even after such revocation it is probable that the public right to issue another permit continues and is superior to the rights of the patentee.

As to the numerous other works for which right of way may be permitted under the broad and inclusive terms of the Act of February 15, 1901, I am of the opinion that, in the absence of a regulation to the contrary issued under the broad authority given by the statute, the rights of the permittee continue after the issuance of patents to the lands affected and are superior to the rights of the patentees until such time as the Secretary shall exercise his discretionary power to revoke. It is, however, desirable that this construction of the statute shall be embodied in a regulation which cannot be misunderstood. The regulations are therefore amended as follows:

At the end of paragraph 38 add the following words:

“The final disposal by the United States of any tract traversed by a right of way permitted under the said Act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such

right of way until such permission shall have been specifically revoked in accordance with the provisions of said Act.”

It is also desirable that such patents should contain on their face a notation of the prior permits and of all easements to which the lands are servient when the patent issues. You will therefore be guided by the following regulation in the issuance of all patents:

In every patent hereafter issued for a tract of land traversed by a right of way approved or permitted (including revocable permits) under any of the right of way laws and not forfeited or revoked before such issuance, such right of way or permit shall be expressly noted on the face of the patent by specific reference to the date when and the statute under which the approval was made or permit issued. Such notation shall be in substantially the following form:

Sec. T..... R....., is subject to all rights under an application by numbered, and approved, 19...., under the Act of being an application for

It may be noted that the subject matter of the foregoing amendment is touched upon by two pending bills (S. 6440 and H. R. 19858). The Department has expressed its views (by letter of May 2, 1912, to the Chairman of the Senate Committee on Public Lands) on the Senate Bill. The regulations hereinbefore made will protect permittees

from any demands that might otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way. The rights of the public, however, are not fully protected because private arrangements between such claimants, after they have obtained patent, and the permittees might give the permittees a perpetual right of way for any of the enumerated works (except a canal or ditch) free of the regulative power intended to be reserved to the Secretary of the Interior by said statute. The public can be safeguarded against this danger by withdrawal under the act of 1910 (36 Stat. 847) of all lands outside of National Forests over which rights of way have hitherto or shall hereafter be permitted under the said statute by permits which remain unrevoked. The statutes relating to National Forests reserve them from appropriation at the will of individuals except under the mineral laws and certain of the right of way laws. The General Withdrawal Act of 1910 also subjects the withdrawn land to private appropriation under the mining laws except as to coal, oil, gas, and phosphate. Lands within National Forests servient to existing permits under the Act of 1901 are therefore already protected from private appropriation in like manner, though not to like extent, as are those withdrawn under the Act of 1910.

The withdrawals hereby ordered should be limited to the extent necessary to protect the works. In fixing this limit the Department is not restricted to the designation of legal subdivisions or aliquot parts

thereof. For example, withdrawal for a transmission line should include only a 100-foot strip.

You are hereby instructed to take up this matter with the Director of the Geological Survey with a view to your recommending jointly with him such withdrawals as are required by this letter.

Very respectfully,
WALTER L. FISHER,
Secretary.
PPW.

Defendant's Exhibit No. 5.

Admitted.

[Endorsed]: #752, Consolidated. U. S. District Court, District of Idaho. Filed May 23, 1921. W. D. McReynolds, Clerk. By ———, Deputy.

No. 3769. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 3, 1922. F. D. Monckton, Clerk.

4-207.

“B”
JAP.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON.

May 5th, 1921.

I hereby certify that the annexed copy of Secretary's Decision, D-46785, dated April 23, 1921, John A. Nye et al. vs. Washington Water Power Co., is a true and literal exemplification from the

press copy of the said decision on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal]

C. M. BRUCE,

Assistant Commissioner of the General Land Office.

D-4, 6785

April 23, 1921.

JOHN A. NYE et al.

v.

WASHINGTON WATER POWER CO.

“F”

(Apr. 28, 1921) Protest—Petition for Revocation
of Permit.

Prior decision modified.

Official Copy Not to be Taken from the Record.

MOTIONS FOR REHEARING.

The Department has reconsidered the above-entitled case wherein, upon petition of John A. Nye et al. decision was rendered February 8, 1921, directing that patent to Nye, embracing 146.50 acres be recalled and reissued free from the encumbrance, or restriction, that the land so patented was subject to the right of way for a reservoir granted to the Washington Water Power Company, February 2, 1909, under the act of February 15, 1901 (31 Stat. 790); that the permit granted to said company be revoked to that extent; and that other original homesteaders coming within the purview of the ruling as laid down by said decision of February

8, 1921, be afforded opportunity to make showing that the facts in their cases were similiar to those in this proceeding.

Motions for rehearing having been filed by Nye on behalf of himself and others, and also by the Washington Water Power Company, the Department heard the case orally April 18 and 19, 1921. In the light of the record and of the arguments presented by brief and orally, the Department concludes as follows:

7—2

D—46785

The Washington Water Power Company prior to issuance of the permit granted February 2, 1909, constructed and used the main works of its present plant. Thereafter, January 25, 1909, said company applied for a permission, or license, under the act of February 15, 1901, *supra*, to overflow certain lands in the Coeur d'Alene Indian Reservation, Idaho, to an elevation above sea level of 2128 feet, the overflow being represented as covering 6240.81 acres. Said lands were a part of the surplus Indian lands, the disposition of which had been provided for in the act of June 21, 1906 (34 Stat. 325—355). The permit of the Washington Water Power Company was granted February 2, 1909, upon payment of \$1.25 per acre, for the benefit of the Indians of the Coeur d'Alene reservation.

Regarding the procurement of the permit by the Company, the Department finds nothing in the record to impugn its good faith. As to the company's operations under said permit, it is found that such

operations as were carried on thereunder were in accordance with law and under authority duly granted by this Department. Said permit is in full force and effect and will so remain except in so far as it may be revoked under and by virtue of this decision.

The Department, pursuant to proclamation of the President dated May 22, 1909 (37 L. D. 698), and in conformity with the provisions of the act of June 21, 1906, *supra*, opened all the surplus Indian Lands within the Coeur d'Alene Indian Reservation to entry.

Prior to and at the time the lands were thrown open to entry in May, 1910, the rules and regulations of the Department provided that issuance of a patent upon lands covered by an outstanding permit under the said act of February 15, 1901, revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 13-17), provided—

Upon receipt of applications for right of way by the General Land Office, the same will be examined and then submitted to the Secretary of the Interior with recommendation as to their approval. Permission to use rights of way through a reservation or any park designated in the act will only be granted upon approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest. If the application, and the showing made in support thereof, is satisfactory, the

Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and it is to be expressly understood, in accordance with the final proviso of the act, that any permission given thereunder may be modified or revoked by the Secretary or his successor, in his discretion, at any time, and shall not be held to confer any right, easement, or interest in, to or over any public land, reservation, or park. The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented. The regulations quoted were in effect until August 24, 1912, when the Department pursuant to instructions issued to the Commissioner of the General Land Office under date of August 23, 1912, revoked the instructions of July 8, 1901 (31 L. D. 13-18). Paragraph 9 of regulations issued August 24, 1912, under the act of February 15, 1901, *supra*, (41 L. D. 152), still in effect provides—

The final disposal by the United States of any tract traversed by a right of way permitted

under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act. (Secretary to Commissioner of General Land Office, Aug. 23, 1912.)

The record discloses that the Department by decision of July 29, 1910, rescinded and set aside its approval of the permit granted to the Washington Water Power Company, February 2, 1909, which order of revocation was vacated by departmental decision of April 22, 1912, upon motion for rehearing. With knowledge that the permit had been revoked by the order of July 29, 1910, and that the regulations then in effect provided that issuance of patent revoked a permit, the settlers or entrymen had reason to believe that they would ultimately secure clear title, notwithstanding that motion for rehearing of departmental decision of July 29, 1910, had been filed within the time prescribed by the Rules of Practice on behalf of the Washington Water Power Company.

Under the circumstances it is directed that as to all lands embraced in entries made prior to August 24, 1912, and carried to patent, still in the hands of the original entrymen, who have, to date of this decision, continued in ownership of the lands, or in the hands of transferees who acquired title prior to August 24, 1912, permits will be revoked and patents reissued free from the re-

striction upon surrender of the original patents and satisfactory showing in each case that the entrymen, or transferee, comes within this ruling. The prior decision of February 8, 1921, is modified accordingly.

Appropriate instructions will be given to the Commissioner of the General Land Office to carry this decision into effect.

(Signed) ALBERT B. FALL,
Secretary.